No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., ET AL.
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION,

Appellants
Cross Appellees

vs.

U.S.A., EX REL. MOSHER STEEL COMPANY,

Appellee
Cross Appellant

No. 21307
No. 21307A
No. 21307B
No. 21307C

REPLY BRIEF OF APPELLANT UNION TANK CAR COMPANY

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REPLY BRIEF OF APPELLANT UNION TANK CAR COMPANY

Mosher complains in its statement of the case that it finds itself between Scylla and Charybdis (M.Br. 2). This dilemma is of its own making. Mosher's problem arises from the fact that it has asserted numerous conflicting theories against both Union and Ward. As a result, it no sooner attempts an explanation of its case on one theory of recovery than it discloses the fallacy of another.

Consider that Mosher at one time or another has sponsored evidence to prove (1) that its work was

performed pursuant to purchase orders issued by IMI individually, (2) that it was performed pursuant to purchase orders issued by the IMI-Ward joint venture, (3) that it was performed pursuant to an interim agreement signed by IMI's division manager on behalf of Union, (4) that it was performed pursuant to an oral contract made with Page during a November 15 telephon conversation, (5) that it was performed for IMI-Ward but orally guaranteed by Union during the November 15 telephone conversation, (6) that it was performed pursuant to a contract between Union and IMI-Ward with Mosher as a third party beneficiary, and (7) that it was performed in part on the strength of a bankruptcy court approved February 2 agreement to which IMI, Ward and Union were all parties. This fast and loose approach to the truth has served "greatly to complicate and confuse this case" (M.Br. 2), and thus far the complications and confusion have consistently worked to Mosher's advantage and to Union's decided prejudice.

Moreover, the opportunity for maneuver in this situation has not escaped Dragor's attention. Without challenging a single finding of fact in its specification of errors, Dragor writes a statement of the case which does not remotely resemble Judge Walsh's findings. The statement is in reality an unremitting argument that Union is solely and exclusively liable because Moore said "he concluded" the credit of IMI-Ward was "no good" and never "looked to" IMI or Ward for payment (M.Br., p. 34-9).

Mosher's answer to this argument reveals all the weaknesses and internal contradictions brought about by the inconsistent positions it has heretofore adopted. Mosher's witness Moore for example, saying that he was not looking to IMI for payment was plain nonsense

in view of the fact that the record shows Moore executed Mosher's sworn claim against IMI which resulted in a $55,000 stock distribution in the IMI bankruptcy. As Judge Walsh said to counsel, "I know what he's testified to, Mr. Warnock, but the [proof of claim] document is in evidence" (R.T. 455).

As to expressions such as Moore's about credit, Professor Corbin states:

> "This expression [to whom the promisee 'gave credit'] may very easily be confusing. When C lends money or sells goods on credit to P, he may very often do so without any expectation that P will ever pay and in sole reliance upon the financial responsibility of S. In one sense, C lent or sold on the 'credit' of S, because the 'credit' of S was good and the 'credit' of P was bad. S is nevertheless a surety and his promise is within the statute." (2 *Corbin on Contracts* (1950 Ed.) § 352 at p. 229.)

The record facts establish that because of Wilson's October visit, Mosher initially expected to receive a purchase order from Union's Graver Division on the Davis-Monthan work; that on October 31 Mosher learned no such purchase order would be forthcoming and was asked by Orr to accept IMI-Ward purchase orders covering that work as well as additional work for Vandenberg; that Moore agreed to accept the joint venture's orders but in addition wanted a guaranty from Union; that on November 15 Page agreed to guarantee Mosher's initial material shipment for Davis-Monthan but conditioned a broader guaranty on a letter of final approval requiring prior clearance from his superiors; that such final approval was not given; and that Mosher never again sought payment from Union until after the IMI bankruptcy and then only because plaintiff's officers "felt" there had been an oral guaranty.

With respect to Mosher's criticisms of our Statement of the Case (M.Br., pp. 5, 6), our opening brief was carefully referenced to the record and we have carefully reviewed those citations. We are satisfied that our Statement of the Case is meticulously accurate and that Mosher's criticism that our statement is "fragmentary" and "distorted" is irresponsible and wholly unjustified.[1] Counsel's ill-advised comments only serve to highlight the singular absence of any reference to the testimony or documentary evidence in the Statement of Facts contained in Mosher's brief, in violation of Rule 18 of this Court.

I.

THE COURT BELOW CORRECTLY REFUSED TO HOLD THAT UNION WAS LIABLE TO MOSHER UNDER THE OCTOBER 16 LETTER EITHER AS AN ORIGINAL OBLIGOR OR OTHERWISE.

There is no issue on this appeal with respect to the October 16 letter because the District Court declined to hold that Wilson's discussions with Mosher's officers, as reported in the October 16 letter, gave rise to a Union-Mosher contract. It rejected Mosher's proposed findings and conclusions that there was "an oral contract made on October 13, 1961 between Union and Plaintiff," or that "Sam Wilson was authorized to enter into this contract on behalf of Union," or that "in the alternative, Union ratified or adopted Wilson's actions," or that an oral contract was "memorialized in the interim purchase order dated October 16, 1961" (R. 1406,

[1] At page 6, counsel imply that our brief inserted or deleted quoted words, which is utterly false. For example, counsel complain that we used the word "assuring" referring to Moore's testimony (R.T. 354-5). Reference to page 355 of the transcript shows that this witness employed the word "assurance" on three separate instances on that page alone.

1390-2. Mosher filed no cross appeal challenging the District Court's action in rejecting these proposed findings and conclusions, because the record would not support them.

The October 16 Letter Did Not Purport To Be An Absolute And Binding Contract.

An examination of the October 16 letter reveals that the document *per se* did not purport to be an absolute and binding contract between Mosher and Union but was prepared by Mitchell in order to confirm with Wilson the terms which Mosher expected would be subsequently incorporated in a Graver purchase order. The second paragraph, for example, contemplates that a "purchase order will be forthcoming from Graver" and that "In the interim it would be appreciated if you [Wilson] would review the conditions of this order" (M.Ex. 1). Compare *Owens-Corning Fiber Corp. v. Fox Smith Sheet Metal Co.*, 351 P.2d 516 (Wash., 1960).

It also appears from the letter that Mitchell knew he was dealing with an IMI representative rather than an agent of Union. The letter states, at page 1, "The following conditions of this order are as follows and per agreed in conference between *Mr. S. A. Wilson of Denver Steel & Iron Works Company* and Paul H. Mitchell and R. L. Burton of Mosher Steel Company" (M.Ex. 1). Clause 18 of the letter states, "It is understood that all materials from *customer's plant in Denver* as well as materials used at mills, will be shipped to Mosher Steel Company, Houston, Texas" (M.Ex. 1). Mitchell admitted that the plant described was the Denver Steel & Iron Division of IMI (R.T. 116-7). Even the acceptance clause of the letter shows that Wilson signed as division manager for Denver Steel & Iron Work Company "for" Graver (R.T. 114-117, 147).

Mitchell testified that he knew Wilson since 1958 (R.T. 114) and was aware that he was an employee of Denver Steel & Iron Division of IMI (R.T. 115-6) and not an employee of Union Tank Car Company (R.T. 116). He admitted that it was his duty to determine "the authority of people who purport to be agents for other companies," (R.T. 117) was aware that Lionel Lancaster was Union's manager on the Davis-Monthan project (R.T. 117), and never checked with Lancaster to determine whether Wilson as an IMI employee had authority to negotiate contracts for Graver (R.T. 117).

Wilson Had No Authority To Execute Contracts With Graver

But assuming *arguendo* that the October 16 letter purported to be a binding contract, it remained incumbent upon Mosher to show that Sam Wilson, as IMI's division manager, had authority to act as Graver's agent in signing contracts on its behalf. No proof of this kind was ever offered and was contradicted by all the testimony in the record.

Wilson's activities in this incident should not be confused with his activities in the acquisition of raw steel for the joint venture. That was done under an arrangement embodied in the original contract between the parties (Jt.Ex. 8) and is fully explained at Page 5 of Union's opening brief. It had nothing to do with the subletting of the fabrication work involved in this case, which came about only when it became apparent that the joint venture would be unable to fulfill its commitments.

George Morton, IMI's president and joint venture manager, declared that he never authorized Wilson to delete the subject work from the joint venture contract. Morton testified, "At no time was Mosher to deal

with Graver in the matter of this subcontract. The subcontract was issued by IMI to Mosher, and we were and did have and retained responsibility for seeing that Mosher performed and our expediters, our Joint Venture management, retained its control with Mosher to see that deliveries were made, to work up schedules, to do all the things which we would normally do with any subcontractor" (M.Ex. 29, p. 33).

Morton further affirmed that Wilson's trip to Mosher's plant came about as a result of instructions which he gave Wilson. Morton said that as a result of Graver's complaint about the joint venture being behind schedule, he decided to subcontract some of the joint venture work (M.Ex. 39, pp. 12-13). Morton testified (M.Ex. 39, p. 20):

> "At the time it was decided to subcontract Sam Wilson was given the task of locating a subcontractor. He advised me that Mosher had the capacity to handle this work, that they were interested, and that he would like to go down to the Mosher plant, meet with the Mosher people, and see whether or not he could negotiate a satisfactory contract. I gave him permission to do so, told him to report back to me what he could — what the terms of this agreement would be and the terms of what it would cost us to have this work done."

Morton also testified that "as part of our contractual arrangements with Graver we were obliged to get their consent to subcontract and to the subcontractor, and so at this point, I believe it was at this point, Graver was brought into the picture" (M.Ex. 39, p. 21). Wilson conceded that he had never obtained any authority from his superior, Morton, to delete the Davis-Monthan work from the joint venture contract or to subcontract it out on Graver's behalf. Mosher sponsored Wilson as a

witness and was therefore bound by his testimony. He testified (R.T. 223):

"Q. Now again going back to our plaintiff's Exhibit 1 for identification, you signed this document on behalf of Denver Steel and Iron works Company, did you not?
"A. That was my position at the time, yes.
"Q. And you showed that you were signing it as division manager of that company, is that right?
"A. I believe that's the way it reads.
"Q. Now, did you get any authority from Mr. Morton who was president of that company to have Idaho-Maryland Industries, your employer, represent that Graver was going to issue a purchase order?
"A. No, sir."

It therefore appears that Graver could not have dealt directly with Mosher without the consent of the joint venture because Graver had a contract with the joint venture to pay for the same work. This fact was known to Mitchell at the time (R.T. 116).

Moreover, Wilson's lack of authority to execute contracts in Graver's name was admitted by Wilson. He admitted that he had never received authority to sign a contract in Graver's name and had never signed a contract in his entire life in the name of Graver (R.T. 224):

"Q. Now before you went down to Houston, or I guess it was Dallas, where you had a talk with Mr. Burton and Mr. Mitchell, did you ask Mr. Lancaster [Union's project manager] for authority to sign a contract in their name?
"A. No, sir.
"Q. And did Mr. Lancaster tell you to sign the contract in their name?
"A. No, sir.

"Q. And you had never signed a contract in your entire life in the name of Graver?
"A. No, sir."

Wilson also stated that he never asked for approval of his action in signing the October 16 letter (R.T. 225):

"Q. Now after this whole transaction was over or at any time after your receipt of this so-called letter of October 16, did you ever sit down with Mr. Lancaster and go over the terms and provisions of this contract?
"A. I do not believe so.
"Q. Did you ever go over the terms and provisions before signing it?
"A. No, sir.
"Q. Did you ask Mr. Harle for authority to sign this contract?
"A. No, sir."

These two men were the only Graver employees having to do with this matter who Wilson ever met during the course of the entire transaction.

Accordingly the testimony of plaintiff's own witnesses shows that Wilson had no authority from IMI (R.T. 223) or the joint venture (M.Ex. 39, pp. 30, 23) or from Graver (R.T. 224) to sign the October 16 letter and did not represent to Mosher that he had such authority (R.T. 302). Wilson testified (R.T. 212):

"Q. Now you never at any time in all the time that you dealt with this [steel procurement] matter, you never at any time issued any purchase order in the name of Graver, did you?
"A. No, sir.
"Q. And nobody ever told you to issue a purchase order in the name of Graver, did they?
"A. No, sir.

"Q. And all you ever did on that was to issue a requisition in the name of IMI, is that right?
"A. That's right.
"Q. And pursuant to that Graver issued its own purchase order and credited on this contract, is that right?
"A. That's right."

The October 11, 1961 meeting in Denver was the only meeting prior to the time Wilson signed the letter at which any Graver representative was present. Lancaster, while not a witness at the trial, in his deposition categorically denied that he gave Wilson at that meeting any authority to sign or negotiate a contract in Graver's name (U.Ex. WWWW, pp. 22, 55). Harle also testified that he gave Wilson no such authority, and Wilson admitted, "Tom [Harle] didn't talk much in those meetings" (R.T. 188). However, Wilson did attribute to Lancaster the statement that "a Graver purchase order would be forthcoming if I could negotiate a satisfactory deal" (R.T. 234, 188).

Assuming that the words attributed to Lancaster by Wilson were true, they certainly could not be construed as appointing Wilson a special agent for Graver to concluded a contract in Graver's name or to sign a contract on its behalf. The statement that a purchase order would be forthcoming "if I can negotiate a satisfactory deal" conferred no authority on Wilson to determine in his own discretion whether the deal was satisfactory or to execute a contract on the basis of his own personal conclusion. The authorities so state:

> "Authority, actual or apparent, to seek purchasers, solicit orders, or to conduct negotiations with a view to sale gives no power to enter into an absolute and binding contract, or a contract to sell without obtaining the principal's approval . . ."

Dayton Bread Co. v. Montana Flour Mills Co., 126 F. 2d 257, 261 (6 Cir., 1942).

> "Ordinarily one authorized merely to initiate or carry on negotiations for a contract or to receive proposals to be submitted to the principal has no implied or apparent authority therefrom to enter into a binding contract as to the subject matter involved in the negotiations." 2 C.J.S. *Agency*, § 104, p. 1248.

See also *Anheuser-Busch v. Grovier-Starr Produce Co.*, 128 F. 2d 146, 152 (C.A.10, 1942); *Nunnally v. Hilderman*, 373 P.2d 940 (Colo., 1962); *Equitable Mortg. Co. v. Thorn*, 26 S.W. 276, (Tex. Civ. Ap., 1894).

Wilson's Action Was Never Ratified.

Absent proof of actual authority the October 16 letter could never have become a binding contract unless some Graver official ratified Wilson's action in signing that document. Any inquiry as to whether ratification occurred must of necessity be limited to the time period between October 20, when Wilson signed the letter, and October 31, when Orr advised Moore, Burton and Mitchell "that no purchase order from Graver would be forthcoming" (R.T. 796-8, 264). During the eleven-day interval the only meeting between any Graver representative and Mosher occurred at the October 23 meeting in Denver, attended by Harle of Graver and Burton of Mosher. (R.T. 255). This was a meeting of production men designed to establish a procedure whereby plate steel which Graver had purchased pursuant to joint venture requisitions (R.T. 925) and delivered to Denver Steel & Iron was to be transferred from Denver to Houston (R.T. 312-3, 945-6). As Graver's expediter (R.T. 292) Harle was responsible for facilitating the rail shipment of the steel (R.T. 293).

Burton testified that during the course of the

Denver meeting no discussion of any financial matters occurred (R.T. 313), and Wilson admitted in his deposition that at the time of the October 23 meeting Harle did not even know that Wilson had signed the October 6 letter (R.T. 225). In order to show ratification, plaintiff would have had to establish that Harle was empowered to approve Wilson's action, that he was furnished with the material facts, and that he was aware that his approval was being sought. *Restatement of Agency* 2d, § 93. However, it was conceded by Moore (R.T. 392), Mitchell (R.T. 120) and Burton (R.T. 292) that they at all times understood that Harle was not authorized to contract on behalf of Graver for the purchase and payment of the fabricated steel which Mosher subsequently delivered under the IMI-Ward November 3 purchase orders. It was also admitted by Mosher's agents that Harle had at no time promised anyone at Mosher that he would execute a purchase order (R.T. 303), and that neither Burton nor Mitchell nor Moore ever asked Harle or anyone else at Graver to issue a purchase order (R.T. 120, 308, 396).

Beyond this, the record shows that as soon as responsible people at Graver learned that Mosher had circulated a letter drafted for Wilson's signature and referring to a forthcoming Graver purchase order, they immediately took exception to the action. Branting stated in his memorandum, "It is my understanding that Denver Steel & Iron was to subcontract the work which could not be handled in their own shop, not to commit Graver to pull their chestnuts from the fire" (Union Ex. G; R.T. 513). Lancaster, the Graver project manager, sent a TWX back to Branting, saying, "This was taken care of directly and immediately with George Morton. Mosher has received a purchase order from Idaho-Maryland Industries, Inc. and Graver Tank Mfg. does

not enter into it" (Union Ex. M).

Morton at once dispatched Orr and Holmes to Texas in order to get the matter straightened out with Mosher (R.T. 790-791, 789). As a result of this visit to the Mosher plant on October 31, Mosher's officers knew at once that no Graver purchase order would be forthcoming. From that date onward and until this suit was filed, Mosher never asserted a claim against Graver on the theory that the October 16 letter constituted a contract between plaintiff and Union. Thus Moore, in all of his subsequent conversations with Harle, never contended that Union was bound to pay by reason of the October 16 letter (R.T. 395, 6):

"Q During your various conversations with Mr. Harle, you never made any claim under the October 16 letter?
"A No.
"Q At your conference in Dallas February 16, no such claim was made under the October 16 letter?
"A No.
"Q You said you talked to Mr. Page twice. You never told Mr. Page in either conversation that you claim Graver was liable to you under that letter of October 16, did you?
"A No.

* * *

"Q You never wrote any letter to Graver saying: See here, your agent signed a letter of October 16 and we expect to be paid under it. No such letter or anything like it in your files, is there?
"A No."

Again, when Messrs. Mosher and Moore visited Union's office in Chicago following the IMI bankruptcy, at no time during the meeting was any claim made that

Union was liable under a purported contract signed by Mr. Wilson (R.T. 867-9).

Burton similarly conceded that after the October 31 meeting with Orr he never again discussed or claimed that a purchase order was forthcoming from Graver by reason of the October 16 letter (R.T. 303):

"Q You didn't ask Mr. Lancaster for a purchase order, did you?
"A No, sir.
"Q And you never discussed a purchase order with Harle after October 23 when you met with him in Denver?
A. No, sir, I don't believe I did."

We submit these facts fully sustain Judge Walsh's refusal to enter Mosher's proposed findings and conclusions with respect to the October 16 letter.

II.

MOSHER AGREED TO PERFORM THE DAVIS-MONTHAN AND VANDENBERG WORK PURSUANT TO IMI-WARD'S NOVEMBER 3 PURCHASE ORDERS BUT IN ADDITION UNSUCCESSFULLY SOUGHT A GUARANTY OF PAYMENT IN THE EVENT THE JOINT VENTURE FAILED TO PAY. (Reply to M.br. pp. 16-19)

Union throughout these proceedings has contended that what Mosher sought but was never promised during the November 15 Moore-Page telephone conversations was a conventional guaranty of the joint venture's November 3 purchase orders. Ward, as well as Mosher, has consistently disputed this contention because Ward recognized that a request for such a guaranty necessarily presupposed the existence of an underlying IMI-Ward obligation to pay (Ward br. pp 21-40). The Court below held that just such an underlying obligation of

IMI-Ward existed (Conc. 4, R. 1238) by reason of Orr's October 31 meeting with Mosher pursuant to which the joint venture's November 3 purchase orders were issued. See Findings of Facts Nos. 29 and 30. These findings have not been challenged by anyone on these appeals, either in a required Specification of Error or otherwise. They are not only supported by substantial evidence but by uncontroverted testimony.

The clearest narrative account of events at the October 31, Dallas meeting was given by Wallace Orr, who was the joint venture officer directed by joint venture manager Morton to conclude a subcontract between Mosher and IMI-Ward. Orr testified that he came to IMI in 1960 on loan from Radiation Incorporated (R.T. 821) and later that year became IMI's assistant vice president and assistant manager on ballistic missile programs (R.T. 822, 245). Shortly after the inception of the joint venture, he was appointed by Morton to serve as "Director of Contracts for the IMI-Ward Joint Venture (R.T. 786). As director of contracts for the joint venture his "duties and responsibilities included the negotiation of all the contracts for the joint venture and the administration of these contracts" (R.T. 786). These duties were performed under the direction of Morton who was given authority under the joint venture agreement to make all necessary "commitments related to the normal performance of the joint contracts" with Graver (Jt. Ex. 7, Para. 6).

Orr testified that his trip to Mosher's Houston office came about as a result of instructions received from Morton (R.T. 790-1). Morton gave him an unsigned copy of Mitchell's October 16 letter, which the former described as a "proposal from Mosher" (R.T. 789, 790, 801, 806). Morton told him "that there had been some discussions or a proposal made by Mosher Steel with

Mr. Sam Wilson" (R.T. 791). Morton had previously instructed Wilson to report to him on those negotiations (M.Ex. 39, p. 20). Lancaster had also called the negotiations to his attention as a result of Branting's "chestnuts-out-of-the-fire" memorandum (U.Ex. G).

Morton told Orr "that we had no contract with Mosher to protect the Joint Venture, we had to get it on contract, but the time for delivery was extremely short and he wanted me to go down and negotiate the subcontract with Mosher" (R.T. 803). He instructed him "to go to Houston to get together with the people from Mosher to negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties" (R.T. 971). Orr was accompanied on the trip by William Holmes, who was "Manager of Construction" for the joint venture (R.T. 971). They took with them the cutting lists for the steel that had been prepared by the engineering department of Denver Steel & Iron (R.T. 792).

At Houston, Orr and Holmes met with Burton, Mosher's production vice president (R.T. 792). They discussed the purchase order which the joint venture proposed to issue on the Davis-Monthan work as well as an additional purchase order for fabrication on the Vandenburg part of the job (R.T. 792). Burton told him these matters were outside his province and would have to be discussed with Mosher's "finance people" in Dallas (R.T. 792).

Burton, Orr and Holmes flew to Dallas the same day for a further conference at Mosher's Dallas office (R.T. 793). Orr testified that in addition to Burton, Mitchell and Moore participated in the meeting (R.T. 793, 805). Moore said he took part by telephone (R.T. 352). The meeting lasted "approximately an hour and a half" (R.T. 796).

During the meeting Orr reiterated his request that Mosher accept a purchase order from the joint venture concerning the Davis-Monthan work previously discussed with Wilson as well as a further purchase order covering $20,000-$30,000 additional work for Vandenberg (R.T. 808-9). Orr testified that "the substance of the conversation at that time was to go over the prices to be established for the fabrication of this steel. We came to an agreement on the price at $160 a ton, and on any material that was furnished by Mosher they would charge the Joint Venture $170 a ton" (R.T. 793).

The subject of credit was also brought up during the meeting. Orr declared, "The question was raised, . . . by I think Mr. Moore, as to the financial capacity of Idaho-Maryland Industries. And at that time we pointed out to Mr. Mitchell and Mr. Moore that this was not a negotiation for Idaho-Maryland Industries itself, . . . we represented the Joint Venture of Idaho-Maryland Industries and Ward Industries, and if he cared to check Dun & Bradstreet, I think at that time Ward Industries' net worth was something in the neighborhood of $11,-000,000. We were talking about a $300,000 order, with the addition of the Vandenberg material fabrication, which was somewhere in the neighborhood of $25, or $30,000 more" (R.T. 795). Mosher's officers answered by saying "that Idaho-Maryland Industries did not have credit, they would not accept an Idaho-Maryland Industries purchase order", but Orr once more "pointed out to him that we were submitting a Joint Venture purchase order for the material" (R.T. 796).

After that Orr related that "there was discussion back and forth on it" and "they [Mosher's officers] went out and made several telephone calls, I do not know to whom" (R.T. 796). Orr next stated (R.T. 796-7):

. . . "[T]hen Mr. Moore and Mr. Mitchell agreed

to accept the purchase order of the joint venture which I was to go back and . . . I would go back and incorporate in the purchase order the items we had agreed upon, and that I would have it in the mail to them as soon as I could get back to Los Angeles. This I did do. There were to be two separate purchase orders, one covering Vandenberg and one covering the Tucson job."

Orr gave Burton the cutting lists which he and Holmes had brought along from Los Angeles (R.T. 792). Burton said that as "he now had the cutting lists and he felt that they could go back and get started to work on the job provided we would get the purchase order in immediately" (R.T. 809). Orr related the final thing "said was that they would accept the purchase order from the joint venture" (R.T. 814).

Orr and Holmes then returned to Los Angeles where Orr advised Morton and Vernon John of what had taken place (R.T. 834). He also instructed Frank Wright, the purchasing officer of the joint venture, to prepare separate purchase orders covering the Davis-Monthan and Vandenberg work (R.T. 798). Orr testified, "I gave Mr. Wright a copy of this proposal letter [Mitchell's letter of October 16] and told him to prepare the purchase orders in accordance with the paragraphs I designated in the proposal letter, plus other items" (R.T. 855). Orr identified Joint Exhibits 9 and 10 as the November 3 purchase orders he directed Wright to prepare (R.T. 979-8). When asked why the purchase orders were prepared on IMI forms Orr testified, "I did not [have joint venture forms], until later when we got a stamp which said Joint Venture, but at this time we didn't have the forms, we used the IMI forms for the Joint Venture" (R.T. 856).

On November 8 Frank Wright also sent Mosher a

supply of receiving report forms to cover shipments to the joint venture (Jt.Ex. 44; R.T. 145, 103).[2] After that Orr said, "They started making their deliveries, we received in the Joint Venture office their shipping documents whch we matched with the receiving documents, they were attached to an invoice and then sent to the United California Bank on all the shipments that were made . . ." (R.T. 817). They were assigned to the Bank pursuant to the financing arrangement negotiated between the Bank and the joint venture (R.T. 859-860).

The foregoing account of the transaction fully supports Judge Walsh's conclusion that "Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained in Joint Exhibits 9 and 10 . . ." (Conclusion 4, R. 1238).

III.

THE NOVEMBER 25 PAGE-MOORE TELEPHONE CONVERSATION RESULTED IN NO GUARANTY BEYOND MOSHER'S FIRST SHIPMENT TO DAVIS-MONTHAN BECAUSE UNION DECLINED TO GIVE FINAL APPROVAL ON ANY BROADER COMMITMENT. (Reply to M.br. pp. 20-80)

The central issue presented on this appeal is whether the District Court correctly held that "Page's telephone conversation with Moore on November 15" had the "legal result" of obligating Union "to pay Mosher directly for all sums becoming due to Mosher" under the joint venture purchase orders (Conclusions 6, Findings

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[2] Jt. Ex. 44, dated Nov. 8, 1961 reads:

"Transmitted herewith are 100 Idaho Maryland Industries Inc. — Ward Industries Corp. Receiving Reports in accordance with your request of today.

These documents are to be used in conjunction with work called for on our Purchase Order Nos. 15917-2 and 15925-2."

35 and 39). Determination of this issue necessarily depends upon a careful examination of the Page and Moore testimony concerning that conversation and that which preceded it on November 7. Yet all that Mosher's brief states with reference to the conversations is that Union has seized upon the "sometime characterization and the non-legal use of the word 'guaranty' by Mr. Moore" (Mosher Br., p. 50). The fact is that throughout the record Moore consistently referred to the alleged agreement as a promise to pay in the event the joint venture failed to pay which was embodied in a "letter of final approval" or a letter "outlining the agreement". Only once did Moore leave out "if the joint venture failed to pay" language in his testimony (R.T. 361-2), and even then corrected himself later on cross-examination. We draw together all of the significant testimony of Moore on this subject for this Court's scrutiny.

November 7 Conversation

Moore testified that he only spoke twice with Page on the subject of Union's "responsibility" for payment. The first of those conversations occurred on November 7. He stated that the conversation came about as a result of Harle's inquiry as to when the first shipment for Davis-Monthan could be expected (R.T. 354, 267). He told Harle that the shipment would not be released unless Graver would be responsible for payment (R.T. 354-5). Harle said to him that the one person at Graver who could give such assurance was John Page (R.T. 355). A telephone call was put through to Page and Moore for the first time testified that he was seeking assurance that Graver would pay "if we did not receive our money" from the joint venture. He stated (U.Ex. UUUU, p. 22):

"It was a very brief conversation with Mr. Page

and I just told him that they would have to agree to withhold payment from the Joint Venture, IMI-Ward, to pay us *if we did not receive our money.* John Page said that he could not grant this unless he had received the approval of Mr. Morton, the President of IMI." (Emphasis supplied.)

When examined once more on the same subject Moore reiterated that Graver's assurance of payment was being sought "if we were not paid within the terms of the sale", and identified the terms as those described in the IMI-Ward November 3 purchase orders (R.T. 355-6):

"Q. You say then you talked to Mr. Page?
"A. Yes.
"Q. What did you say to Mr. Page?
"A. I told Mr. Page we would have to have assurance, that *if we were not paid within the terms of the sale* that they would be responsible for paying Mosher Steel Company.
"Q. And what were the terms of the sale?
"A. *Thirty days net, one-half of one percent ten days.*
"Q. What did Mr. Page say to you?
"A. Mr. Page said he was not in a position to carry out my request without the approval of Mr. Morton, Manager of IMI-Ward Industries, Joint Venture." (Emphasis supplied.)

Examined a third time, Moore once again affirmed that he was seeking a guaranty (R.T. 408):

"Q. . . . As I recall your testimony, on that November 7, you telephoned Mr. Page and up to that time nothing had been done about contacting Graver or getting in touch with them with respect to their paying you if payment was not made under the IMI purchase order.
"A. No, I had not made any contact with them.

"Q. So you called Mr. Page and you told Mr. Page that you didn't want to go ahead with this change or substitution unless Graver would agree to pay you *if IMI failed to do so?*
"A. Yes." (Emphasis supplied.)

Moore's account of the November 7 telephone conversion was corroborated by his associate, Burton. The latter testified that he, along with Harle, was present at the November 7 meeting when Moore called Page (R.T. 320). He confirmed that following the conversation Moore told them that he was asking for an agreement that Graver would pay if IMI would fail to pay (R.T. 322):

"Q. I am asking you whether or not Mr. Moore did not say after that conversation that . . . he was asking Page to get an agreement or letter that Graver would pay *if IMI failed to pay.*
"A. *I believe that is essentially correct.*" (Emphasis supplied.)

November 15 Telephone Conversation

Moore's testimony concerning the November 15 telephone conversation establishes that he sought no different type of obligation on that date than had been discussed on November 7. The word "direct" crops up in his testimony but only with reference to an agreement "to pay us direct if we did not receive the money." Moore said (U.Ex. UUUU, p. 27):

"I asked him what — had he gotten approval from Morton so we could proceed with the order that the service department wanted a release on it, and he said he had gotten approval of Morton and that *they would pay us direct if we did not receive the money* and withhold the money, of course, from

the IMI-Ward, the amount that they paid us." (Emphasis supplied.)

He was then asked whether the existence of an indebtedness from which Graver might deduct money from the joint venture was expressly made part of the bargain. Moore was equivocal on this point but reiterated that Mosher was to be paid "if we were not paid by the joint venture." He testified (U.Ex.UUUU, p. 33):

"Q. Now the understanding was that if you didn't get paid by the joint venture Page was to withhold money from the joint venture to pay Mosher?
"A. We were to be paid. Now whether he would withhold it from the joint venture, that would be something else, but that was the idea, of course.
"Q. *But only if the joint venture didn't pay you?*
"A. *Yes, if we weren't paid on time by the joint venture.*". (Emphasis supplied.)

Moore was next asked whether he had related the terms of the sale to Page, an item which certainly would be mentioned if there was a "direct" contact with Graver. He related (R.T. 409):

"Q. . . . [A]t that time you told him again that you were insisting that Graver pay *if IMI failed to pay within the terms of the order,* is that right?
"A. *Yes.*
"Q. And you said that the terms were thirty days net, or one-half per cent discount within 30 days, something like that?
"A. That was our terms. *I didn't relate the terms in our conversation.*" (Emphasis supplied.)

Thus Moore at all times regularly and consistently referred to the alleged agreement as an obligation to pay

in the event IMI and the joint venture failed to pay, with the exception of one instance during his direct examination on Friday, November 20, when he dropped that expression (R.T. 361-2). This instance did not pass unnoticed at the trial. At the first opportunity he was asked and denied that he thereby intended to indicate a change in his testimony (R.T. 456):

> "Q. Do you remember when your deposition was taken in my office on June 28, 1963? Looking at page 33 . . . line 1:
>
> 'Q. Now the understanding was that if you didn't get paid by the joint venture Page was to withhold money from the joint venture to pay Mosher?
>
> 'A. We were to pe paid. Now whether he would withhold it from the joint venture, that would be someone else, but that was the idea, of course.
>
> 'Q. But only if the joint venture didn't pay you?
>
> 'A. Yes, if we weren't paid on time by the joint venture.'
>
> "Q. Now that was your testimony at the time of that deposition, wasn't it?
>
> "A. Yes.
>
> "Q. *And you testified here Friday to the same effect, didn't you?*
>
> "A. *Yes.*" (Emphasis supplied.)

Moreover, Moore's testimony, unless read with the fixed purpose of arriving at a contrary conclusion, showed that even he realized that guaranty depended upon receipt of a "final approval" letter from Page. He said Page told him "he would write me a letter in a day or two giving final approval on this agreement" (R.T. 361) and that he had expected "a letter in a day or two outlining this agreement" (R.T. 362). Moore expressly acknowledged that the wire received from Page guar-

anteeing the first shipment was not the final approval he was awaiting. He testified:

"Q. This is what you told Mike in answer to his inquiry: 'I have a wire from Mr. Page. Graver guaranty account of Idaho-Maryland. You may mark it open.' Now, Mr. Moore, didn't that TWX there, mean you understood Mr. Page's telegram to be a guaranty of the entire account?
"A. I *understood* all the time it was *supposed to be* a guaranty of the entire amount.
"Q. The telegram was?
"A. I had assurance from the very beginning. Yes, I *expected* the entire amount *to be* guaranteed. (R.T. 415-6)

* * *

"Q. Then why did you ask for a letter?
"A. I don't recall that — he promised the letter and I don't know that it was strict on my request that he did. It was *understood* all the time from November 7 he *was to give* us this okay. (R.T. 414).

* * *

"Q. Now, you ignored this telegram when it was received, didn't you?
"A. Yes.
"Q. You didn't pay any attention to it at all?
"A. I paid attention to it that it said the fact I *was to receive* the letter in a day or two." (R.T. 413) (Emphasis supplied.)

The foregoing testimony, fairly read, certainly confirms in every material respect Page's comparable testimony that beyond the first shipment he had first to secure the approval of his "higher ups" before sending a letter giving "final details" (R.T. 742, 744, 759). It is further corroborated by Burton's testimony which shows that Moore recognized his conversation with Page created no obligation (R.T. 330):

"Q. Have you ever asked him [Moore] whether or not he simply misread that telegram from Mr. Page? Have you? You ought to be able to answer that question right quick.

"A. Yes, I have asked him that.

"Q. What was his explanation?

"A. *He depended upon a letter to follow that set out the rest of the requirements as he understood them.*" (Emphasis supplied.)

Accordingly, the situation is exactly the same as in *Merritt-Chapman*, where this Court held that "conversations relating to a 'promised' purchase order" were "nothing more than negotiation" and gained "no greater legal significance" from what the complaining party "understood", *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp.*, 305 F. 2d 659, 663-4. *Moreover, the testimony of Moore and Page can be searched high and low without finding a single reference during these negotiations to a discussion of any work other than for Davis-Monthan. The Vandenberg job was never mentioned.*

Moore's conduct is entirely inconsistent with a professed belief that Mosher had a direct contract with Union. Actually, he asked for a guaranty, and failed to follow up his request. Considered on this basis, his testimony is entirely consistent:

1. It makes sensible Page's November 15 telegram (Jt.Ex. 22) which guarantees payment of the first Davis-Monthan shipment and refers to a letter to follow containing "complete details" — a contemporaneous document which was never challenged as inaccurate until after IMI's bankruptcy;

2. It explains why the Mosher shop order for the Davis-Monthan work was amended (Jt.Ex. 13) for the purpose of *changing* the customer's name from Graver to IMI — a senseless act if Moore only hours before had

concluded a "direct" contract with Graver;

3. It explains why Graver's officers considered but rejected (Jt.Ex. 21, 24) enlargement of the telegram guaranty — again a totally meaningless conference if a "direct" contract covering Davis-Monthan were already in existence;

4. It explains why Mosher sent all invoices (Jt.Ex. 14) to IMI rather than to Graver (R.T. 397-8), the latter being the party who would ordinarily receive such invoices if a "direct" contract had been negotiated;

5. It explains why change orders (U.Ex. VVV-ZZZ, R.T. 129, 136) were negotiated with IMI rather than with Page or anyone at Graver, which would have been mandatory if a "direct" contract existed;

6. It explains why the joint venture invoices covering the Mosher work were assigned to the United California Bank (U.Ex.IIII, JJJJ, R.T. 860) — again an act which under a "direct" contract approach would have Union paying both Mosher and the joint venture for the same work;

7. Finally, it explains why, before Mosher's lawyers entered the picture upon IMI's bankruptcy, Mr. Mosher and Mr. Moore told Van Gorkom that "they felt that there had been an oral guarantee made by the Union Tank Car Company" but made "no claim made whatsoever that bore on a direct relationship between Union Tank Car Company and Mosher" (R.T. 867-8).

Mosher Statute of Fraud Cases

Plaintiff cites no less than thirty-five cases in an effort to convince this Court that a promise to pay in the event another fails to pay is really not a promise covered by the statute of frauds. Mosher does not dispute that under conflicts principles the Illinois statute applies. Yet half the cases cited are from jurisdictions other than Illinois. Obviously these cases cannot be

individually analyzed in a reply brief. However they fall into categories which immediately distingush them from the present case. The important fact is that no case cited holds the statute inapplicable where a contractor is alleged to have orally promised a materialman about to deal with a subcontractor that he will pay for goods to be delivered to the subcontractor in the event the latter fails to pay.

The first category of cited cases involves the "main purpose" or "leading object" doctrine. *Clifford, Schoenfeld, Whiting, and Holmes are typical of this group.* (M.Br. p. 59, 61). They hold the doctrine applicable where three elements are present: (1) a default on the part of a third person to pay money presently owing the promisee; (2) *a repudiation* of the contract by the promisee with the third person by reason of the latter's default; and (3) *an unqualified promise* by the promisor to pay the third person's debt and/or to pay for further work performed or material furnished in order to induce a resumption of work. This is also true of each illustration under Section 184 of the *Restatement of Contracts.*

None of these elements are present in this case. The joint venture certainly had not defaulted in payment under its purchase orders at the time of the November 15 conversation. Nor had Mosher repudiated these purchase orders because it had not been paid. Instead it sought to obtain from Graver a guarantee of IMI-Ward's order so as to avoid relying solely on the credit of the joint venture. Professor Corbin points out that in such a situation the "main purpose" doctrine is inapplicable. He declares, at 2 *Corbin on Contracts,* § 369, pp. 290-1:

> "Where there is nothing to show that the building contractor is failing to perform his contract with

the owner, or that the latter is not likely to get the construction for which he had contracted, a promise by him to see that some bill for labor or material is paid by the contractor is probably to assist that contractor in getting credit and is not a promise for benefits received by the promisor."

The main purpose rule does not take the case out of the statute where the promise is to pay only in the event that another fails to pay. See *Brown & Root, Inc.*

Mosher's next category is comprised of third party beneficiary cases such as *Granite City, Wilson v. Bevans,* and *Wickham v. Hyde Park.* As discussed *infra,* this case does not involve a third party beneficiary contract because there is no showing that Union made a promise to IMI-Ward for Mosher's benefit.

A third category concerns situations in which a contractor orders and promises to pay a materialman for supplies to be delivered to a third person. *Peter v. Raven,* 159 Ill. App. 122, and *Lusk v. Throop,* 189, Ill. 127, fall in this group. For example, in *Lusk* the evidence established that "Lusk told them (plaintiffs) to furnish Carlson & Olson with what groceries and supplies they wanted, and they would pay for them." The case obviously involves an absolute promise, not a promise to pay only in the event a third person fails to pay. Yet it is this case which Mosher contends has by implication overruled the *Heggie* decision at pp. 43-4 of our opening brief.

Still a fourth category of these cases concerns the part performance doctrine applicable to contracts for the sale of lands and, in some jurisdictions, to contracts not to be performed within a year. 2 *Corbin on Contracts* (1950 Ed.) § 459 at p. 581. *Wilson, Fleming, Marr* and *Pettus* (M.Br., p. 69) are land contract cases and involve no promise to answer for the debt of an-

other. The doctrine of part performance is inapplicable to guaranties because a suit on a guaranty, oral or otherwise, necessarily arises *only after performance* by the alleged promisee.

Although citing thirty-five decisions Mosher has been unable to bring itself within the main purpose rule because (a) at the time Mosher sought a promise from Union, IMI-Ward was not in default under its contract – indeed, Mosher had accepted the joint venture's purchase orders and payment was not yet due, and (b) there was no direct or substantial consideration flowing to Union from Mosher. True, Union had an interest in prompt performance by IMI-Ward, but as the Fifth Circuit sagely observed in *Brown & Root Inc. v. Gifford-Hill & Co.,* 319 F.2d 65, 69, "Completely uninterested persons do not guarantee the debts of others."

Mosher was not the only fabricator of steel, and even if Mosher's refusal to perform caused IMI-Ward to breach its subcontract, Union had its remedies for such default.

What Mosher sought, the evidence shows, was a guaranty, and if as the trial court believed Page orally promised a guaranty, that promise is unenforceable under the State of Frauds.

In concluding its argument Mosher quotes out of context language from *Resseter* as support for the novel proposition that under Illinois law a promise can *never* be within the statute unless there is an existing debt *due and unpaid* at the time the promise is made (M.Br., p. 74). The existing debt requirement mentioned in *Lusk* as well as *Resseter* is explained in *Illinois Surety, v. Munro,* 209 Ill. App. 407-414:

> "The rule to the effect that before a promise can be held to be collateral it must be shown that there is an existing debt of some other person to

which the promise can be collateral is a correct rule but should not be understood as meaning that the debt of the other person must be in existence *at the time the collateral promise is entered into* but as meaning that there must be an actual binding promise of some other person to the creditor, for, without such original obligation, the promise cannot be collateral. The question of *when* the *debt* of the other comes into existence is not important, just so long as it *does* come into existence." (Emphasis supplied.) To the same effect, 2 *Corbin Contract,* (1950 ed.) § 372.

Mosher's authorities suggest no statute of frauds test other or different from that set out in the leading Illinois precedent on the subject, that is "*whether or not the party sought to be charged was to be liable at all events or only in case the other party fails to pay.*" *Ault v. Associates Discount Corp.,* 43 Ill. App. 2d 409, 414, 193 N.E. 2d 226, 229 (1963).

Illinois Estoppel Cases

Mosher's brief confirms our assertion that the so-called fraud of which plaintiff complains is Page's failure to keep the promise attributed to him by Moore to write a letter of final approval within a "few days" (M.Br., p. 75-80). This is exactly the type of conduct that the Illinois Supreme Court in *Loewenberg, Ozier* and *Sinclair* has unequivocally held does not constitute actionable fraud at law and does not give rise to an estoppel precluding a party from asserting the statute of frauds (Union br. pp. 49-51). These decisions have been so recognized in the Illinois law literature. (See 31 Chicago Kent L. Rev. 18; Illinois Law Forum (1954) p. 544.)

Even if the Illinois law were otherwise, we fail to understand how Mosher can claim to have acted in rea-

sonable reliance upon Page's alleged promise. A promise made on November 19, 1961 to send "final approval" letter in a "few days" might induce reliance and the performance of work, for a few days, or even a few weeks in anticipation of its arrival. But when no such letter is received in that period of time and Mosher does nothing to check o nthe matter, the suggestion that plaintiff is still "relying" thereon right through and even after the February 2, 1962 IMI bankruptcy is beyond credence. Such monumental and unswerving reliance, had it occurred, would certainly have been reflected somewhere at some time in some writing in Mosher's records. Yet Burton conceded that no such writing was ever found (R.T. 311):

> "Q. Is there in existence, to your knowledge, in the files of Mosher Steel Company, any letter directed to your own company's personnel or to Graver or to anyone else up to the time of the bankruptcy which suggests that Graver Tank Company had guaranteed the account of IMI, or the account of the joint venture? Did you write anybody a letter or anybody in your company write such a letter?
> "A. Not that I have seen."

IV.

THE COURT ERRED IN HOLDING THAT AN AGREEMENT EXISTED BETWEEN UNION AND IMI-WARD FOR MOSHER'S BENEFIT. (Reply to Mosher Brief, pp. 80-86)

Mosher fails to resolve the mystery of just how and through whom Union and IMI-Ward concluded a third party beneficiary contract whereby IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward and deduct Mosher's invoices from the contract price between Union and

Ward (Conclusion 8, R. 1239). Such a contract, if it existed, certainly must have been based on an offer and acceptance by someone in the companies concerned.

Vernon John did prepare a letter authorizing the payment of Mosher invoices approximating $225,000 (not $321,000) after acceptance of Mosher work and the deduction "of such payment from our joint venture contract price" (Jt.Ex. 26). However, this letter was prepared because of Page's earlier advice that a "guaranty would be *considered* only upon the written request of Mr. John which must include an agrement that any payment . . . would then be withheld from IMI-Ward's progress payments" (U.Ex. K).

If John's letter is supposed to constitute the offer underlying the third party beneficiary contract, then Page could hardly have accepted that offer because the Court found "John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently" (Finding 34, R. 1231). While the Court also found that Harle on November 14 "saw" a copy of the letter in IMI's office, no one suggests that Harle accepted the same. And Trytten certainly did not accept the offer because his December 12 draft of a supposed guaranty (Jt.Ex. 24), based on John's letter, was never executed or sent on advice of his fellow officers (M.Ex. 36, R.T. 364).

Nor can it be said that Lancaster, who was in charge in the field, accepted. He proposed Union " . . . . guarantee only a separate shipment basis if requested," as noted on Feurt's December 12 memorandum (Jt.Ex. 24). The whole case for a third party beneficiary contract depends upon the slender thread of Moore's testimony, in language he attributed to Page and Morton, and denied by both of them.

Beyond this, Mosher's rights under a so-called third

party beneficiary contract could be no greater than those of the joint venture and any claim on this theory makes Mosher subject to the defenses and inherent equities between Graver and IMI-Ward (*Rest. Contracts,* § 140).

Mosher suggests that perhaps the claimed arrangement was not a third party beneficiary contract after all, but rather a modification of the basic IMI-Ward-Graver subcontract, which would involve "a reduction of the Joint Venture contract price" (M.Br., pp. 82-3). The Morton testimony cited in ostensible support of this still further theory involved a hypothetical question (Pl.Ex. 40, p. 50). Morton was asked whether in view of the United California Bank financing arrangement, Union and the joint venture could modify the joint ventuer subcontract by reducing the work and the contract price in view of the fact that the monies due for future performance were already assigned to the bank as security for a million dollar line of credit. Morton claimed that this would be possible (Pl.Ex. 40, p. 52) but emphatically denied that the Mosher work had been so deleted from the joint venture contract.

Finally, we again call attention to the Fifth Circuit's decision in *Wolters* (U.Br., pp. 58-9), which holds that even where a third party beneficiary contract exists and has been breached, the proper measure of damage is the loss remaining after deducting amounts recoverable from the party primarily liable. Mosher's failure to discuss this precedent only re-emphasizes its applicability in the present case.

V.

MOSHER FAILS TO DISTINGUISH THE EADS CASE WHICH ESTABLISHES THAT PLAINTIFF WAS ESTOPPED FROM RECOVERING FROM UNION BY REASON OF ITS ACTION IN THE IMI BANKRUPTCY. (Reply to Mosher Brief, pp. 86-93)

Mosher secured its distribution in the IMI bankruptcy by alleging under oath in its proof of claim that its fabrication work was performed for and at the request of IMI individually and that the November 3 purchase orders were IMI purchase orders (U.Ex. E). It did not then affirm, as it does now that the orders were not IMI purchase orders but joint venture obligations or that IMI was not liable individually but solely as a member of IMI-Ward. Nor did Mosher affirm that while the fabricated steel happened to be delivered to IMI, Mosher was not "looking to" IMI for payment and was not "relying on the credit of IMI". Allegations of this sort clearly would have precluded any stock distribution on its claim.

Nevertheless plaintiff contends that its successful claim prosecution does not preclude a recovery against Union and Ward on an inconsistent factual and legal theory because the value of the IMI distribution "has been deducted" and because the claim document declared that it was filed "without prejudice to its [Mosher's] rights against the said Ward Industries Corporation, and the said Union Tank Car Company" (M.Br., pp. 87, 88). This contention shows either a real or assumed misconception of the *Eads* case. Application of the election doctrine in *Eads* did not turn upon whether the plaintiff had placed a self-serving "without prejudice" allegation in his claim or had agreed to deduct the amount received amount received in bankruptcy. It was founded on the fact that in the bankruptcy proceeding *plaintiff successfully asserted his claim to be an individual debtor of the bankrupt while in the subsequent civil action the same debt was asserted as a partnership obligation.*

This is exactly the situation present in the instant case. Mosher obtained a judgment in the bankruptcy court on the theory that its claim was an individual

obligation of IMI. Now Mosher claims that the same indebtedness is not an IMI obligation but a debt of IMI-Ward and Union's Graver Division. As the Tenth Circuit stated, "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (p. 84).

Contrary to Mosher suggestion this result is in no way inconsistent with the Section 16 provisions concerning co-debtors of bankrupts. Had Eads asserted in his bankruptcy claim that Chapman and Merrill were co-debtors on a partnership obligation, Eads perhaps would have received nothing on his claim for want of assets remaining after payment of the individual creditors of the bankrupt. However, under Section 16 his claim against Merrill as an alleged co-debtor would have been unaffected by Chapman's discharge.

Similarly, had Mosher asserted that IMI-Ward and Union were both liable for payment of its work and had sought recovery against IMI only in its capacity as a joint venturer, plaintiff most assuredly would have received no bankruptcy distribution, but its claims against IMI-Ward and Union as alleged co-debtors in this proceeding would not be barred, as they are here, by IMI's discharge. Mosher's position would have been factually and legally consistent throughout.

The instant suit actually presents an even stronger case than *Eads* for application of the election doctrine. Unlike *Eads,* Mosher's claim disclosed that plaintiff was aware of the inconsistency of his position at the time of the bankruptcy proceedings. Mosher's action was deliberate, while Eads' attorney may through ignorance of the actual facts have been inadvertently caught up in the problem. Moreover the debtor in possesson in the

IMI bankruptcy sought to stay on allowance and distribution on Mosher's claim pending the determination of this action (M.Ex. 30). With knowledge of its inconsistent claims, Mosher nevertheless opposed the motion and secured an immediate distribution to which it unquestionably was not entitled under its present theories of recovery. This deliberate conduct further underscores the applicability of *Eads*.

At pp. 92-93 Mosher suggests that a "joint venture does not necessarily create the same legal relationship as does a partnership" either under state law or the provisions of the Bankruptcy Act.

Under New York law the same rules govern both partnerships and joint adventures. As was said in *Ross v. Willett* (76 Hun. 211): 'A joint adventure is a limited partnership, not limited in a statutory sense as to liability, but as to its scope and duration, and under our law joint adventures and partnerships are governed by the same rules'." See also *Hutchinson v. Birdsong*, 211 App. Div. 316, 319. *Glenmark, Inc. v. Carity*, 30 Misc. 2d. 1065, at 1069 and *Brown v. Leach*, 189 App. Div. 158, 163. "*A joint adventure is subject to exactly the same rules as a technical partnership*". *Hardin v. Robinson*, 178 App. Div., 724, 729.

In *Wilcox v. Pratt*, 125 N.Y. 688, the New York Court of Appeals ruled, at 690:

> "It is not necessary to inquire whether there was a partnership between the parties in the technical legal sense of that time. Whether it was a partnership or a joint enterprise, the contract is to be enforced and the rights and liabilities of the parties determined upon the same principles as are applied by courts of equity to partnership transactions."

To the same effect, *King v. Barnes*, 109 N.Y. 267, 285.

That the partnership created by a joint venture is subject to the partnership provisions of the Bankruptcy Act is absolutely unquestioned. As long ago as 1877, the District Court in *Thrall v. Crampton*, 23 Fed Cas. 1161, in dealing with a joint venture, ruled "that this was a partnership adventure", and that the primary right of "the partnership creditors to have their debts satisfied out of partnership property before those of separate creditors can be" was unchallenged bankruptcy law. The following decisions, each one of which deals with a joint venture under bankruptcy law, unanimously confirm this rule of law. *In re Taub*, 4 F. 2d 993 (C.A. 2 1924); In re Kessler & Co., 174 Fed 906 (D.C.N.Y. 1909); *Nestor v. Joseph*, 265 Fed. 246 (C.A.7 1920).

An association of individuals carrying on a business for profit, called a "communidad", *though not technically a partnership under Civil Law or a partnership under Anglo-American common or statutory law*, is nevertheless the entity contemplated by the term "partnership" contained in the Bankruptcy Act, and is subject to the provisions thereof. (*Benitez v. United States*, 141 Fed. (2d) 943, cert. den. 324 U.S. 859.)

VI.

THE COURT ERRED IN DENYING UNION'S COUNTERCLAIM. (Reply to M. Br., pp. 93-4)

This subject has been fully discussed in our opening brief (pp. 66-74) and Mosher has not attempted to dispute that argument by a single citation of law or fact. (M.Br., p. 94)

We believe the record unmistakably shows that Union would never have been sued in this action had IMI-Ward in the first instance not failed and refused to pay Mosher for the fabrication work it required in

order to perform its subcontract with Union's Graver Division. Plaintiff in reality has proceeded against Union as a surety liable for the debt of another. It is unimportant in this connection whether Mosher, or the Court, characterizes Union as a co-debtor or a guarantor. Plaintiff was aware of the contract relation between the defendants and was entitled to but one performance which, as between the two, Ward as a joint venturer should perform. Restatement *Security,* § 82.

The record shows with equal clarity that Union, having already compensated the joint venture, is being called upon to pay twice for the same work. Herbert Dean, a Certified Public Accountant with Arthur Andersen & Co., testified that, on the basis of the joint venture contract, after reflecting the cost of Graver supplied material and the percentage of physical completion on February 2 "Graver had paid the joint venture $74,785 more than was due to the joint venture" as of the date of IMI's bankruptcy (R.T. 622). Dean further testified that by having to take over and complete the joint venture work on a crash basis, Union expended and additional $6,344,629.88 by September, 1962 "which had not been repaid by the joint venture" (R.T. 623). His testimony and exhibits have never been challenged in this proceeding.

George Middleton, Graver's assistant missile project manager, testified that the work included in the exhibit prepared to measure physical completion as of February 2 (U.Ex. AA), specifically included Mosher's fabricated steel work up to February 2. He identified the items in the exhibit (R.T. 572). His testimony has never been challenged in this proceeding.

The assigned joint venture invoices in evidence covered items under Section 4 of the subcontract which in turn included the blast lock and levels 2 and 3 fabrica-

tion work delivered by Mosher up to February 2 (U.Ex. IIII, JJJJ, T-Y, R.T. 555, 594). Because of the formula for invoicing on the basis of percentage of completion by site and level, Mosher points out that each item of Mosher fabrication work cannot be specifically identified on the face of these invoices (M.Br., p. 84). However, Wallace Orr testified that all the Mosher work up to bankruptcy was so covered by the assigned invoices (R.T. 859-60). He was examined by plaintiff's counsel (R.T. 860):

> "Q. You don't know whether the invoice involved in this particular matter was actually assigned to the bank, do you?
> "A. *Yes, all of them were assigned to the bank.*" (Emphasis supplied.)

With these undisputed facts in the record we respectfully submit that Union established a cause for the equitable relief prayed for in its counterclaim. It was entitled to a decree directing Mosher to first seek satisfaction from Ward as the party primarily liable before resorting to Union. The relief was mandatory under A.R.S. § 12-1642, and completely in accord with the common law principles applied in *Wolters* and discussed in the authorities cited at page 69 of Union's opening brief. Even the district court conceded that the counterclaim stated a proper claim for relief and refused to grant Mosher's motion challenging its legal sufficiency. Yet for some unaccountable reason, the court denied the counterclaim following trial without entering a single fact finding or legal conclusion or even suggesting any reason for so doing.

In equity and good conscience, no reason exists for permitting this extraordinary decision to stand.

CONCLUSION

For each of the reasons set forth above and in its opening brief, Union prays that the judgment entered on May 4, 1966 be reversed as to this appellant, or in the event not reversed, then remanded to the district court for appropriate further proceedings on appellant's counterclaim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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